(10)

No. 98-436

In the

Supreme Court of the United States

October Term, 1998

John H. Alden, et al.,

Petitioners,

v.

State of Maine

Respondent.

On Writ of Certiorari to the Supreme Court of Maine

Brief of Amicus Curiae in Support of Respondent

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QUESTION PRESENTED

May a state employee sue the state under the Fair Labor Standards Act in a state court?

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INTEREST OF AMICUS CURIAE[1]

Home School Legal Defense Association is a membership organization representing over 60,000 families and approximately 200,000 children. HSLDA's advocacy of its members' interest frequently involves litigation concerning a family's constitutional rights. It is the position of the organization that the interpretation of the Constitution according to the original intent of the founders is the only safe basis for the preservation of limited government and all rights including those important to our association. Accordingly, HSLDA has begun the Original Intent Project to systematically research and advocate constitutional interpretation according to the principle of original intent.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act cannot be applied to state governments for two separate reasons that are made clear upon an examination of the original intent of the Constitution.

First, the historical record explicitly demonstrates that the founders intended to preserve the doctrine of sovereign immunity in the original text of the Constitution. That doctrine was strengthened by the adoption of the Tenth Amendment. And the loophole to this principle that was created by the

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[1] This brief was not authored in whole or in part by counsel for any party. It has been funded in its entirety by the *amicus curiae*. *See* Sup. Ct. Rule 37.6

The *amicus curiae* requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties have been submitted for filing to the Clerk of Court. *See* Sup. Ct. Rule No. 37.3(a).

decision of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), was immediately and decisively closed by the Eleventh Amendment.

The one valid exception to this principle of state sovereign immunity under the constitution—the Fourteenth Amendment—is not applicable to this case since the FLSA is in no way justified as an exercise of congressional power under that amendment.

Second, the FLSA cannot be applied to state government since the power of Congress to regulate interstate commerce cannot be constitutionally applied to the regulation of the conditions of employment of state government officials or workers.

Although in theory, the plaintiffs can argue that the issue presented in this case was not addressed in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 134 L. Ed. 2d 252 (1996), the founders did not leave the question open for the adoption of a new standard. The historical record forecloses any suggestion that states may be sued in state courts by state employees for supposed violations of a congressional labor law.

ARGUMENT:

I
THE FRAMERS OF OUR CONSTITUTION INTENDED TO PRESERVE THE SOVEREIGN IMMUNITY OF STATE GOVERNMENTS

A. SOVEREIGN IMMUNITY PRIOR TO THE BILL OF RIGHTS

The subject of sovereign immunity was much on the minds of the Framers. Alexander Hamilton, in Federalist, No. 81,

raised the possibility that a citizen of one state might sue another state in federal court to collect a debt. He dismissed that possibility with the following emphatic statement of the general principle of sovereign immunity: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union."

Critics of the new Constitution were still troubled, however, by Article III, section 2, which spoke of federal courts hearing controversies between states and citizens of other states, or foreign citizens. George Mason and Patrick Henry feared that states would lose their sovereign immunity. James Madison, defending the Constitution before the Virginia Convention, insisted that states could only be sued in the new federal courts *with their consent*. Madison said: "'The next case provides for disputes between a foreign state and one of our states, should such a case ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, without the consent of the parties. *If they consent*, provision is here made.'" 3 Elliot's Debates 533 [*emphasis supplied*].

John Marshall, in the same Convention, made the same assumption. Marshall said: "Suppose, says [a critic], in such a [federal] suit, a foreign state is cast; will she be bound by the decision? If a foreign state brought a suit against the commonwealth of Virginia, would she not be barred from the claim if the federal judiciary thought it unjust? The previous consent of the parties is *necessary*; and, as the federal judiciary will decide, each party will acquiesce." 3 Elliot's Debates, 557 [*emphasis supplied*].

James Iredell was a North Carolina delegate to the Constitutional Convention who responded to George Mason's "Objections to the New Constitution." In 1788, he wrote: "Mr. Mason has here asserted, 'That the judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several states.' How is this the case? Are not the state judiciaries left uncontrolled as to the affairs of that *state* only?" Later on in his pamphlet, he wrote, "*In parting with the coercive authority over the states as states, there must be a coercion allowed as to individuals. The former power no man of common sense can any longer seriously contend for; the latter is the only alternative.*" Pamphlets, pp. 335-370; 3 Annals of America 249 [*emphasis in original*]. The very idea of an assertion of coercive authority over the states was abhorrent to those who had worked together to write the Constitution.

B. The Tenth Amendment

Despite these arguments based on the design and logic of the Constitution, critics still feared that the national government would be too powerful and eventually would eliminate the States as viable political entities. Samuel Adams argued that if the states were to be joined in "one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), reprinted in Anti-Federalists versus Federalists 159 (J. Lewis ed. 1967). Likewise, George Mason feared that "the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former." Address in the Ratifying Convention of Virginia (June 4-12, 1788), reprinted in Anti-Federalists versus Federalists, supra, at 208-209.

Proponents of the Constitution realized that it would take more than argument to satisfy these critics. They therefore promised that a Bill of Rights, including a provision explicitly reserving the undelegated powers of the States, would be among the first business of the new Congress. The amendments comprising the Bill of Rights were therefore proposed and adopted early in the first session of the First Congress. The final item in this Bill of Rights became the Tenth Amendment, which reserved all powers not specifically granted to Congress to the states and to the People, respectively. Since the new Constitution did not specifically grant Congress or the federal courts the power to revoke the sovereign immunity of the states, the Tenth Amendment seemed sufficient to protect all of the traditional prerogatives of the states.

C. *Chisholm* and the Eleventh Amendment

The worst fears of the anti-federalists soon appeared to come true, however. When Georgia was sued in federal court by a citizen of South Carolina, Georgia claimed sovereign immunity and refused to appear in court. By a vote of four to one, however, the Supreme Court granted a default judgment against Georgia. The four justices in the majority based their reasoning, not on the original intent of the Framers, but on a *general* judicial power under Article III and the concept of states having only a *limited* sovereignty in a national democracy. *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793). James Iredell, who had argued that such a result could not occur, was now a Justice of the Supreme Court and was the lone dissenter.

This decision created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted. Almost one hundred years later, Justice Bradley wrote for the Supreme Court, "Looking back from our present stand-point at

the decision in Chisholm v. Georgia, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people." *Hans* v. *Louisiana*, 134 U.S. 1, 12-13 (1890).

The Eleventh Amendment brought the law back into line with the original intent of the Constitution. It returned to those principles which the "great defenders of the constitution" had affirmed, giving concrete and specific expression to the abstract and general guarantee of the Tenth Amendment. It proved that Justice Iredell had gotten it right, while the other four justices, with their notion of "limited sovereignty," had gotten it wrong. Those early Americans who reacted so strongly to the *Chisholm* decision would not find this present case difficult to decide. They would protect sovereign immunity in state courts every bit as strenuously as they protected it in federal court.

It is important to remember that federal question jurisdiction was not authorized by Congress until the Judiciary Act of 1875. The Eleventh Amendment decisively closed the only door to intrusions against state sovereign immunity which was open at the time.

D. Supreme Court Precedents

The Eleventh Amendment was a direct, textual override of the *Chisholm* decision. *Chisholm* had said sovereign states could be sued in federal court under diversity jurisdiction. The Eleventh Amendment said they could not. It was a simple solution to a simple problem, which lasted until the problem became more complex. When Congress created federal question jurisdiction for the first time through the Judiciary Act

of 1875, it suddenly became possible for a citizen to sue his or her own state in federal court – a possibility not envisioned in the Eleventh Amendment.

When Louisiana was sued on this basis by one of its own citizens in the late 1880s, the Supreme Court looked to the history and practice of state sovereign immunity rather than to the text of the Eleventh Amendment. The Court noted, "The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm* v. *Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone furthest in sustaining suits against the officers or agents of states.... In all these cases the effort was to show, and the court held, that the suits were not against the state or the United States, but against the individuals; conceding that, if they had been against either the state or the United States, they could not be maintained." *Hans* v. *Louisiana*, 134 U.S. 1, 16 (1890) [*internal citations omitted*].

The next major case to test the limits of the Eleventh Amendment was *Monaco* v. *Mississippi*, 292 U.S. 313 (1934). The text of the Eleventh Amendment prohibited suits by "citizens of subjects of any foreign state," but not suits by foreign states themselves. Certain citizens of Monaco became understandably frustrated at Mississippi's default on $100,000 worth of bonds which had been issued almost one hundred years earlier, especially since they had been accumulating interest at 5% and 6% for that entire time. (The bonds should have been worth over $13,000,000 by 1934, when the case was decided.) The creditors finally donated the bonds to the Principality of

Monaco outright, hoping that Monaco might be able to collect where they had failed.

The Court noted the problems of reconciling the text of the Eleventh Amendment, the previous precedents on sovereign immunity, and the actual words of the Constitution, in, section 2. The Court wrote: "Manifestly, we cannot rest with a mere literal application of the words of section 2 of article 3, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting states. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that states of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' The Federalist, No. 81. The question is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a State, without her consent, by a foreign State." *Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934) [*footnotes omitted*]. The Court relied on the principle of sovereign immunity to rule in favor of Mississippi.

Hans and *Monaco* are peculiar. Although they exemplify the spirit of the Eleventh Amendment, their holdings have little to do with the letter of that Amendment. Justice Bradley, who wrote the opinion in *Hans*, explained the inner logic of these cases:

> This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, *actually reversed the decision of the supreme court*.... This view of the force and meaning of

> the amendment is important. It shows that, on this question of the suability of the states by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of Chisholm v. Georgia.

Hans v. *Louisiana*, 134 U.S. 1, 11-12 [*emphasis supplied*].

"Eleventh Amendment law" might therefore be better described as "Anti-*Chisholm* law." It stands for the principle that states retain their sovereign immunity in federal courts despite provisions of the Constitution that might suggest otherwise. If the Tenth Amendment had been more often enforced by this Court, one would have expected *Hans* and *Monaco* to have been premised on the Tenth Amendment's broad guarantee of the state's prerogatives rather than on the narrow and specific text of the Eleventh Amendment. Whatever the textual basis, this Court has certainly upheld the original intent of the framers of the original constitution (as reaffirmed by the Tenth and Eleventh Amendments) with respect to state sovereign immunity.

E. The Fourteenth Amendment Exception to Sovereign Immunity

This Court has recognized one crucial exception to the general rule of state sovereign immunity – the Enforcement Clause of the Fourteenth Amendment. Writing for the majority in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 134 L. Ed.2d 252 (1996), Justice Rehnquist explained the Court's previous ruling in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976):

> [W]e recognized that the Fourteenth Amendment, by expanding federal power at the

> expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. We noted that section 1 of the Fourteenth Amendment contained prohibitions directed at the states and that section 5 of the Amendment expressly provided that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that section 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

Seminole Tribe, 134 L. Ed.2d at 268 [*internal citations omitted*].

Thus, it is clear that when an act of Congress is designed to enforce Section 1 of the Fourteenth Amendment, Section 5 of that amendment contains the necessary override of state sovereign immunity, provided that Congress explicitly authorizes suits against states.

The Supreme Court of Arkansas misunderstood the significance of the Fourteenth Amendment exception when it considered Arkansas' immunity from suit in its own courts under the FLSA. In *Jacoby*, v. *Arkansas Dept. of Education*, 962 S.W.2d 773 (Ark. 1998), the Arkansas Supreme Court makes the same mistake as the dissent in *Seminole Tribe*, which characterized the Fourteenth Amendment exception as a "narrow and illogical exception." *Seminole Tribe*, 134 L.Ed.2d at 280. The majority in *Seminole Tribe* had a far better grasp of the right relationship between state sovereign immunity and

the Fourteenth Amendment. After the Fourteenth Amendment, Congress had the authority to grant citizens recourse when states deprived them of life, liberty, or property. To call this "narrow" or "illogical" is to forget the lives of half a million Americans that were lost in the Civil War.

The Arkansas Supreme Court has failed to note this Court's crucial distinction between civil rights statutes enacted pursuant to section 5 of the Fourteenth Amendment and other federal laws enacted under the Commerce Clause. This Court's unanimous holding in *Howlett v. Rose*, 496 U.S. 356 (1990), makes it clear that states *cannot* violate the civil rights of their residents by "relying on their own common-law heritage." But this Court's holding in *Seminole Tribe* makes it equally clear that there is a world of difference between the Fourteenth Amendment guarantee of each American's civil rights and the lesser protection of federal statutory entitlements. The Fair Labor Standards Act was *not* enacted pursuant to the Enforcement Clause of the Fourteenth Amendment, so Congress has no power to abrogate sovereign immunity in this case.

F. The Supremacy Clause

If this case were in federal court, the matter would already have been resolved under the Eleventh Amendment and the rule in *Seminole Tribe*. Originally, plaintiffs tried to sue states in federal courts because they knew the state was immune from suit in its own courts. Now plaintiffs try to sue states in state court because they know (after *Seminole Tribe*) that states are immune from suit in federal court. Obviously, hope still springs eternal in the human breast.

The plaintiffs in this case argue that they should win because of the Supremacy Clause. After all, the Constitution and laws

passed pursuant to it are as much laws in the states as laws passed by the state legislature. *Howlett*, 496 U.S. at 368. But this argument proves nothing: the state is immune from its *own* laws in its own courts. If federal laws "are as much laws in the states as laws passed by the state legislature," then Maine is immune from suit in its own courts under federal laws just like it is immune from suit in its own courts under its own laws. Unless Maine has somehow *waived* immunity, Maine is immune from suit.

II.
CONGRESS HAS NO COMMERCE CLAUSE POWER TO REGULATE STATE GOVERNMENT

Our founding fathers delegated certain powers to the federal government, reserving all powers not so delegated to the states and to the people, respectively. We believe that our founding fathers had no intention of subjecting the employment practices of state governments to the centralized control of Congress. No provision of the Constitution expressly delegates such power to Congress, and none of the ratification debates suggest that the framers felt any need for Congress to exercise such power.

The proposition that the federal government is a limited government possessing only enumerated powers is so well known—although little observed—as to require no citation for its proof. However, it is more difficult to find numerous or precise discussions in the historical record for the proposition we advance here—that the founders never intended to give Congress the authority to regulate labor conditions of the employees of state governments. However, one speech by James Madison in the Virginia ratification debates contains all of the essential elements of the principle which we advance.

The nature and tenor of the Virginia debates are well known. George Mason, Patrick Henry, and other men of stature opposed ratification because of the fear that the grant of power to the general government was too broad and the intrusions onto the powers of the states and the rights of the individuals were great and dangerous. Madison and other supporters of ratification repeatedly argued that the Constitution gave Congress and the general government only "delegated powers" and all others were reserved to the states.

In the midst of this debate, Madison made a speech which offered "some reflections to quiet the minds of those gentlemen who think that the individual governments will be swallowed up by the general government." Elliot, Debates on the Adoption of the Federal Constitution, Vol. 3, p. 257. Madison said:

> In order to effect this, it is proper to compare the state governments with the general government, and with respect to the means they have of supporting themselves and encroaching on one another. At the first comparison, we must be struck with these remarkable facts. The general government has not the appointment of a single branch of the individual governments, or of any officers within the states, to execute their laws. Are not the states integral parts of the general government? Is not the President chosen under the influence of the state legislatures? . . . The senators are appointed altogether by the legislatures.

Id.

In other words, the states had the abilities to pick and influence federal officials. But the general government had no

power to pick, influence, or control state officials who "execute their laws."

Later, in this very same speech, Madison declared: "The powers of the general government relate to external objects, and are but few....All agree that the general government ought to have power for the regulation of commerce." *Id.* at 259-260.

Madison asserted two propositions in this speech which was designed to assuage the fears of those who believed the general government had been given too much power: (1) the general government has no authority to appoint or control state officials; and yet (2) all agree that the general government must have the power to regulate commerce. The only logical conclusion which can arise from these two statements is that the power to regulate commerce in no way embraced any power to regulate state officials.

Indeed in this same speech Madison set forth the common understanding of what the power to regulate commerce among the states was intended to achieve.

> I will venture to say that very great improvements, and very economical regulations, will be made. It will be a principal object to guard against smuggling, and such other attacks on the revenue as other nations are subject to. We are now obliged to defend against those lawless attempts; but, from the interfering regulations of different states, with little success. There are regulations in different states which are unfavorable to the inhabitants of other states, and which militate against the revenue. New York levies money from New Jersey by her imposts. In New Jersey, instead of cooperating

> with New York, the legislature favors violations on her regulations. This will not be the case when uniform regulations will be made.

Id. at 260.

Madison believed that the regulation of commerce among the states was designed to prohibit conflicting regulations and tariffs between the states. This Commerce Clause power cannot possibly contain a grant of power for Congress to control the employment of state officials. Madison expressly denied that any provision of the Constitution granted such a power. Such a conclusion would never have "quieted the minds" of Patrick Henry or George Mason. And Madison knew it.

CONCLUSION

For the foregoing reasons your amicus respectfully suggests that the application of original intent of the constitution requires affirmation of the decision below.

Respectfully Submitted,

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